UNITED MALAYAN BANKING CORP. BHD. & ANOR.

v.

PENTADBIR TANAH DAERAH HULU LANGAT SELANGOR

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 21-80 OF 1991]
26 APRIL 1991

LAND LAW: *Order for sale - Public auction - Balance purchase price to be paid within ninety days - Time of essence - Chargee and purchaser varying condition of sale - Forfeiture of deposit by state authority - National Land Code 1965, ss. 263, 264, 268, 417.*

Pursuant to an order of sale made by the defendant, a public auction was held whereby the 2nd plaintiff was the successful bidder and purchaser. One of the conditions of sale was that the balance purchase price must be paid within ninety days from the date of sale failing which the 10% deposit would be forfeited and become the property of the State. It was also provided that time shall be the essence of the contract.

The 1st plaintiff bank is the chargee who requested the order for sale. The 2nd plaintiff entered into some arrangements with the 1st plaintiff to borrow the balance of the purchase price. However the 1st plaintiff did not release the monies to permit the balance to be paid on time. The 1st and 2nd plaintiff had agreed to extend the period to settle the balance by one month without informing the defendant. The defendant objected to this arrangement and the plaintiffs now sought a declaration that the conditions of sale had been mutually varied as to extension of time to pay the balance of the purchase price and also for an order under s. 417 of the National Land Code 1965 (the NLC) that the defendant accept such payment within he time stated.

Held:

[1] The present transaction cannot be equated to a simple contract for sale in which the bank is to be regarded as a seller and the successful bidder as the purchaser who can between them amend the order for sale and the sale conditions to the exclusion of the others involved.

[2] Once the order for sale has been made it is a final order which can only be varied by the Court or a Judge except on the issue of a postponement of the sale under s. 264(3) of the NLC.

[3] In the present case the money was already forfeited to the State Authority and the fact that the second auction had not taken place is irrelevant.

[4] Where the sale is aborted by reason of the failure of the purchaser to complete, the payments required to be made under s. 268 of the NLC have still to be made in accordance with the priorities stipulated therein.

[Plaintiffs' application dismissed with costs.]

Case referred to:
Malayan United Finance Bhd. v. Liew Yet Len [1990] 1 MLJ 317 ***(dist)***

Legislation referred to:
National Land Code 1965, ss. 263, 264(3), 268, 417

For the plaintiff - T.P. Ling; M/s. Che Mokhtar & Co.
For the defendant - Salehuddin bin Saidin Penolong Penasihat Undang-Undang Negeri Selangor

JUDGMENT

Mahadev Shankar J:

Pursuant to an order of sale made by the defendant under the provisions of s. 263 of the National Land Code a public auction was held on 27 April 1990.

The conditions of sale were contained in the proclamation which was in the usual terms. Condition 7 provided that the balance of the purchase price must be paid within ninety days from the date of sale failing which the 10% deposit would be forfeited and become the property of the state authority. Condition 10 provided that in this respect time shall be the essence of the contract.

The 1st plaintiff (the bank) is the chargee at whose instance the order for sale was made. The 2nd plaintiff (the buyer) was the successful bidder. He paid RM19,450 on 27 September 1990 signed the contract and thereby undertook to pay the balance of RM175,050 on or before 26 December 1990.

Apparently the 2nd plaintiff entered into some arrangements with the bank to borrow the balance of the purchase price. This the bank did not release to permit the balance to be paid on time.

On 18 December 1990 Che Mokhtar & Co., presumably on behalf of the buyer wrote to the bank for an extension of one month to settle the balance. The bank wrote back on 27 December 1990 to Che Mokhtar agreeing.

The defendant was not informed of these arrangements.

On 24 January 1991 Che Mokhtar & Co., wrote to the defendant, this time on behalf of the bank enclosing a cheque for the balance of the purchase price. The letter stated that the bank had agreed with M/s. Sykt. Video and Electronic Tristar to extend the time for payment till 27 January 1991. Their connection with Phang Kee Lin was not explained.

Obviously the defendant declined to accede to these arrangements and the bank and the buyer filed this application for a declaration that the conditions of sale had been mutually varied by the bank and the buyer so as to provide an extension of time to pay the balance either for two weeks from the date of an order to be made in the terms of the application or 27 May 1991 whichever is the earlier. A further order was sought under s. 417 of the National Land Code that the defendant do be directed to accept payment of the balance of the purchase price provided it was tendered within the time stated. The extension aforesaid was mutually agreed by a letter between the bank and the buyer dated 22 March 1991.

The basis of this application is two-fold. Firstly that since this was a sale of land from the bank to the buyer it was open to them mutually to agree to vary the terms and conditions of the proclamation of sale. Secondly it was submitted that since the second auction had not yet taken place it would not prejudice anybody to grant the extension sought.

The state legal advisor objected to the application. He pointed out it had not been made before the time for payment of the balance had expired. Secondly the money had already become the property of the state authority.

I rejected this application with costs. My reasons now follow.

Plaintiff's Counsel cited *Malayan United Finance Bhd. v. Liew Yet Len* [1990] 1 MLJ 317 as authority for the proposition that the chargee must be regarded as the vendor. Since the order for sale and the conditions of contract are to be treated as the sale and purchase agreement the submission was that it was open to the parties to vary these conditions if both consented. (see p. 319 RHC at A & E).

With respect this case is clearly distinguishable. The conditions of sale there provided that the deposit money if forfeited was to belong to the chargee. Since the balance was not paid in time the chargees applied to Court for an order of entitlement to forfeit. The purchaser pre-empted this application and obtained an *ex-parte* extension of time to pay the balance nearly a year later. This extension was set aside because it was held that no variation of terms could take place except with the chargee's consent.

The difference in the case before me is this. The defendant was a party to the transaction and the deposit forfeited was not to belong to the bank chargee but to the state authority. I am unable to equate the present transaction as a simple contract of sale in which the bank is to be regarded as seller and the successful bidder as the purchaser who can between them willy-nilly amend the order of sale and the sale conditions to the exclusion of the other powers involved. My previous decisions in the following cases:

(1) Usul pemula No. 21-42 Tahun 1991 *[Chiat Kian Rubber Works Sdn. Bhd. lwn. Southern Finance Co. Bhd. & Pentadbir Tanah Daerah Kelang]* and

(2) Saman pemula No. 24-90 Tahun 1991 *[Bank Bumiputra Bhd. - Pemohon]* should clarify the reasons for this.

At the risk of repetition but for the sake of clarity, I state it as my view that once the order for sale has been made it is a final order which can only be varied by the Court or a Judge except on the issue of a postponement of the sale under s. 264(3) of the National Land Code.

Consequently I am unable to agree that the bank and the buyer can bilaterally amend the sale conditions. In the present case the money was already forfeited to the state authority and the fact that the second auction had not taken place is irrelevant. There is a cost to be paid for the administrative machinery set in motion to obtain an order under s. 263 of the National Land Code. Where the sale is aborted by reason of the failure of the purchaser to complete, the payments required to be made under s. 268 of the National Land Code have still to be made in accordance with the priorities stipulated therein.

I therefore dismissed this application with costs.

Also found at [1992] 1 CLJ 220